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IN THE

Supreme Court of the United States

October Term, 1978

No. 78-193

MICHAEL J. CAPANEGRO,

Petitioner,

—against—

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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UNITED STATES OF AMERICA,

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Michael J. Capanegro respectfully petitions for a writ of certiorari to review a judgment of the United States Court of Appeals for the Second Circuit, entered on May 15, 1978, affirming his conviction in the United States District Court for the Southern District of New York for violations of Title 29, United States Code, Section 501(c).

Opinion Below

The opinion of the Court of Appeals affirming petitioner's conviction has not yet been reported and appears at pages 1a-21a in the Appendix to this petition.

Jurisdiction

The judgment of the Court of Appeals was entered on May 15, 1978 (App. p. 22a). On July 5, 1978 the Court of Appeals denied a timely petition for rehearing and for rehearing *en banc* (App. pp. 23a-24a). The jurisdiction of this Court is invoked under Title 28, United States Code, Section 1254(1).

Constitutional Provision Involved

Amendment V of the United States Constitution provides in pertinent part:

> "nor shall any person . . . in any criminal case . . . be deprived of life, liberty or property without due process of law . . ."

Statute Involved

Title 29, United States Code, Section 501(c) provides:

> "Any person who embezzles, steals, or unlawfully and willfully abstracts or converts to his own use, or the use of another, any of the moneys, funds, securities, property, or other assets of a labor organization of which he is an officer, or by which he is employed, directly or indirectly, shall be fined not more than $10,000 or imprisoned for not more than five years, or both."

Questions Presented

1. Does the due process clause permit conviction of the petitioner of embezzlement from a labor union under 29 U.S.C. § 501(c) in light of the undisputed evidence that he was not an employee of the union but, as retained counsel and attorney for individual union members, was at most its independent contractor?

2. Was petitioner convicted upon an erroneous construction of 29 U.S.C. § 501(c) by which the District Court was permitted to conclude that he was "indirectly" employed by a labor union?

Statement

Petitioner, a member in good standing of the New York bar for over twenty years, was charged in a twenty-four count indictment with embezzlement of funds from a labor union in violation of 29 U.S.C. § 501(c). Specifically, the indictment alleged that the petitioner submitted bills to Local 1101 of the Communications Workers of America ("the union") for legal services rendered to its individual members and that he subsequently received payment from the Local 1101 Defense Fund ("the Defense Fund") despite knowledge that such bills "vastly overstated the nature and value of the services performed". The indictment did not charge that Mr. Capanegro had submitted bills for non-existent clients or that he had failed to render any services to the clients named in each bill. Moreover—and most significantly—the indictment did not accuse Mr. Capanegro of aiding and abetting any union officer or employee in a scheme of embezzlement. Rather, it charged that in acting as an attorney for each of the individual union members and in receiving compensation therefor, petitioner was "employed, directly or indirectly" by the union and was thus a principal in the alleged fraud.

Following the denial of pre-trial motions to dismiss the indictment, the petitioner waived a jury and proceeded to trial in June of 1977. With respect to the central issue of his relationship to the union, the evidence was not in dispute. It established that Mr. Capanegro was a single practitioner who maintained law offices in New York City. In 1971, petitioner was retained by the union to represent it in a variety of matters and as a

result of such retainer received an annual fee of $25,000. The retainer agreement by its terms did not, however, encompass the personal representation of individual union members, officers or employees. Although Mr. Capanegro was denominated the "chief counsel" to the union, he maintained no office at its headquarters, had no union secretary at his disposal, and received no salary or any of the usual employment benefits generally provided to union officers or employees. In short, petitioner was simply a private practitioner on general retainer by a labor union.

In August, 1971, the union commenced a strike against the New York Telephone Company. In the ensuing months, individual members were charged in the New York City criminal courts with a variety of crimes, most of which were classified under state law as misdemeanors or offenses and all of which arose from picket-line skirmishes and other incidents relating to the strike. As such incidents occurred, members would apply to Local 1101 for an attorney to represent them, and they would be referred to the petitioner by officers or employees of the union. Mr. Capanegro, in turn, would represent such individuals and, by agreement with the union's officers, would bill the Defense Fund for his services. Many of such bills were submitted in advance of actual court appearances and, by the testimony of the petitioner, were good faith estimates of the services which he intended to perform and the value of such services. The District Court rejected such testimony with respect to seventeen bills and concluded that such bills had been fraudulently submitted; it acquitted Mr. Capanegro on seven counts of the indictment, finding that the Government had failed to adduce adequate proof that such bills were not in fact good faith estimates of services to be rendered. [App. pp. 25a-50a].

With respect to the petitioner's status *vis-a-vis* the union, the District Court concluded simply that "[w]ith-

in the meaning of 29 U.S.C. § 501(c) . . . Capanegro was employed by [Local 1101]" [App. p. 50a] but supplied no further analysis to indicate the basis for concluding that the statute applied to the petitioner.* The majority of a divided panel of the Court of Appeals held that the petitioner "was employed by the union within the meaning of § 501(c)" [App. p. 7a] but conceded that 'Capanegro as retained counsel of the Union was not its 'employee' in the common law sense of a servant as distinguished from an independent contractor." [App. p. 8a]. Judge Friendly, in dissent, concluded that the petitioner was an independent contractor to the labor union and that his conduct was therefore not properly punishable under § 501(c).

Reasons for Granting the Writ

I.

In *Morisette* v. *United States*, 342 U.S. 246, 263, (1952) this Court articulated the familiar due process standard by which all federal criminal statutes must be measured:

> "The spirit of the doctrine which denies to the federal judiciary power to create crimes forthrightly admonishes that we should not enlarge the reach of enacted crimes by constituting them from anything less than the incriminating components contemplated by the words used in the statute.

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* In denying the petitioner's pre-trial motion to dismiss the indictment on the ground that Mr. Capanegro was not an employee of the union—and therefore not chargeable under 29 U.S.C. § 501(c)—the District Court observed: "There is no case directly in point. Obviously Mr. Capanegro was not an employee in the narrow sense of that word. *He was presumably an independent contractor.*" (emphasis supplied).

> And where Congress borrows terms of art in which are accumulated the legal tradition and meaning of centuries of practice, it presumably knows and adopts the cluster of ideas that were attached to each borrowed word in the body of learning from which it was taken and the meaning its use will convey to the judicial mind unless otherwise instructed. In such case, absence of contrary direction may be taken as satisfaction with widely accepted definitions, not as a departure from them." See also, *Lanzetta* v. *New Jersey*, 306 U.S. 451, 453 (1939) and *United States* v. *Harriss*, 347 U.S. 612, 617 (1954).

In construing 29 U.S.C. § 501(c) to punish the conduct of a private attorney who was clearly not the employee of a labor union, the Court of Appeals has, we submit, done substantial violence to the teaching of *Morisette*, *supra*, and has, in the process, substantially broadened the reach of an important federal criminal statute beyond that intended by the Congress.

In enacting 29 U.S.C. § 501(c) Congress employed language which unequivocally limits the reach of the statute to officers and employees of a labor union,* and, in interpreting such statute, courts have routinely required the Government to prove such status as an essential element of the offense. *E.g.*, *United States* v. *Hart*, 417 F. Supp. 1314 (D.C. Iowa, 1976); *United States* v. *DiBrizzi*, 393 F.2d 642 (2d Cir. 1968). See also, *United States* v. *Silverman*, 430 F.2d 106, 113 (2d Cir.) (Friendly, C.J.), *modified per curiam on other grounds*, 439 F.2d 1198, *cert. denied*, 402 U.S. 953 (1971); *United States* v. *Harrelson*, 233 F. Supp. 869 (E.D. Mich. 1963). Indeed, we have found no case in which any person has been convicted as a principal under § 501(c) who was not an officer or employee of a labor union.

* The legislative history of § 501(c) fully supports the thesis that the section is limited in its reach to officers and employees of a union, and not to the public at large. See generally, S. Rep. No. 187, 86th Cong., 1st Sess.; H.R. Rep. No. 741, 86th Cong., 1st Sess. (1959), U.S. Code Congressional and Administrative News, pp 2318, *et seq.* See also, dissenting opinion of Friendly, C.J., App. pp. 15a-19a.

In the instant case, petitioner was clearly not such an officer or employee, but was nevertheless convicted as a principal under § 501(c). He was not a member of the union; he held no elective or appointive union office; he received no salary or other monetary benefits of employment; no F.I.C.A. or withholding taxes were deducted on his behalf from the money which he received; and he reported to no supervisior or superior with respect to his work. Instead, Mr. Capanegro, in acting as attorney for individual union members, fit the classic common law definition of an independent contractor, a person "who contracts with another to do something for him but who is not controlled by the other nor subject to the other's right of control with respect to his physical conduct in the performance of the undertaking." Restatement Second of Agency § 2(2) (1958); see *Loque* v. *United States*, 412 U.S. 521, 527 (1973); *Radio City Music Hall Corp.* v. *United States*, 135 F.2d 715 (2d Cir. 1943) (L. Hand *J.*); *Avis Rent a Car System, Inc.* v. *United States*, 503 F.2d 423, 429 (2d Cir. 1974); see also, *NLRB* v. *United Insurance Co.*, 390 U.S. 254, 259 (1968). The majority of the Court of Appeals panel conceded that the petitioner "as retained counsel of the Union was not its 'employee' in the common law sense of a servant as distinguished from an independent contractor" [App. p. 8a] but nevertheless construed § 501(c) to reach the conduct of independent contractors:

> "But the statute we are construing does not limit its coverage to officers or employees of a labor organization. It specifically provides for the crim-

> inal liability of '[a]*ny person*' who loots the funds of a union '*by which he is employed*' (emphasis supplied). A labor union like any other employer may employ independent contractors as well as servants or employees." [App. p. 8a].

It is respectfully urged that such construction, supported by no legislative history, does violence to the clearly expressed intention of the Congress to limit the reach of § 501(c) to officers and employees of a labor union. See, legislative history cited in dissenting opinion of Friendly, C.J., App. pp. 15a-19a. Like similar embezzlement statutes to be found in Title 18, the clear congressional purpose in enacting § 501(c) was to subject "union officers or employees to the same test of criminality as government employees, bank officers and the like . . ." *United States* v. *Silverman*, 430 F.2d 106, 127, *modified per curiam on other grounds*, 439 F.2d 1198, *cert. denied*, 402 U.S. 953 (1971). See 18, U.S.C. §§ 654-60. *A fortiori*, a non-employee of a labor union may no more be convicted under 29 U.S.C. § 501(c) than a non-officer or non-employee of a bank may be convicted as a principal under 18 U.S.C. § 656. See, *United States* v. *Giordano*, 489 F.2d 327, 330 (2d Cir. 1973).*

In broadly construing § 501(c) the Court of Appeals has, we submit, permitted such statute to violate "the first essential of due process of law" by defining the statu-

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* It is, of course, possible to convict any non-employee or officer of accessorial liability under such statutes by alleging and proving that such individual assisted a principal, who was such an employee, to embezzle funds. See, *United States* v. *Giordano*, *supra*. In contrast to *Giordano*, however, Capanegro was prosecuted as a principal, not as an aider and abettor. And the trial court's special findings make clear that Capanegro was convicted upon the theory that he was an employee, chargeable in his own right with violations of § 501(c). See, App. p. 50a. See also, App. p. 14a, dissenting opinion of Friendly, C.J.

tory term "employed" "in terms so vague that [persons] of common intelligence [will] necessarily [have to] guess at its meaning and differ as to its application." See, *United States* v. *Culbert*, — U.S.—, 98 S.Ct. 1112, 1114 (1978); *Lanzetta* v. *New Jersey*, *supra*; *Connally* v. *General Construction Co.*, 269 U.S. 385, 391 (1926); see also, *Hynes* v. *Mayor of Oradell*, 425 U.S. 610, 620 (1976). Judge Friendly, in dissent, pointed to the consequences of such construction:

> "Instead of being able to refer to a well-developed body of law which provides a basis on which criminal liability can be determined, trial judges and juries must now minutely scrutinize the relationships of independent contractors to unions to determine if they are close enough for the statute to apply. The majority supplies no real clue as to when 'employee' in § 501(c) is to be taken in its common law context and when it is not." [App. p. 20a].

In light of the substantial due process issue thus raised with respect to the applicability of an important federal criminal statute, it is respectfully submitted that the instant case is appropriate for review by this Court upon a writ of certiorari.

II.

Apart from the important constitutional issue discussed above, it is apparent that the petitioner was convicted in part because of a serious misreading of 29 U.S.C. § 501(c) both by the Government and by the District Court. The statute provides, in pertinent part:

> Any person who embezzles, steals or unlawfully and willfully abstracts or converts to his own use . . . any of the moneys [or] funds . . . of a labor organization of which he is an officer, or by which he is employed, directly or indirectly . . . [commits a crime]

The indictment charged that the petitioner had embezzled from a labor organization "of which he was employed directly and indirectly as an attorney," and the Government contended both in the District Court and the Court of Appeals* that even if Mr. Capanegro was not directly employed by the union, he was "indirectly" employed by it and was thus subject to prosecution under § 501(c). Such construction is completely at variance with the construction of the statute urged by the Government in numerous other cases. Indeed, the Second and Sixth Circuits have consistently interpreted the statutory phrase "directly or indirectly" to modify the first phrase of the statute, describing the crime of embezzlement, not the phrase dealing with employment. "The statutory language condemns the embezzlement or conversion not only of moneys, funds and securities, but also of 'property or other assets of a labor organization . . . directly or indirectly.'" *United States* v. *Robinson*, 512 F.2d 491 (2d Cir. 1975); *United States* v. *Silverman*, 430 F.2d 106, 113-14 (2d Cir. 1970), *modified per curiam on other grounds*, 439 F.2d 1198, *cert. denied*, 402 U.S. 953 (1971); *United States* v. *Santiago*, 528 F.2d 1130, 1135 (2d Cir. 1976), *cert. denied*, 425 U.S. 972 (1976), citing *United States* v. *Vitale*, 489 F.2d 1367, 1370 (6th Cir. 1974); *United States* v. *Harrelson*, 223 F. Supp. 869, 871 (E.D. Mich. 1963).**

In light of such authority, it is clear that the prosecution in the instant case urged upon the District Court a

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* The Court of Appeals found that the petitioner was "directly" employed by the union and so avoided reaching the question of statutory interpretation discussed herein [App. p. 7a, n.3].

** Indeed, in *Silverman, supra*, the prosecutor framed the indictment to eliminate any possible ambiguity as to the interpretation of the statute: "'[T]he defendant, unlawfully, willfully and knowingly, *directly and indirectly*, did embezzle, steal, abstract and convert, to his own use . . .'" *United States* v. *Silverman, supra*, at 109-10. [Emphasis supplied.]

construction of the statute which was substantially at variance with numerous cases construing the same language differently. Such difference was of crucial significance in the instant case, where the petitioner's relationship with the union—and the legal significance of such relationship—were of central importance in the case. In light of the apparent conflict which now exists within the Second Circuit as to the construction—and hence the applicability—of 29 U.S.C. § 501(c), this Court should review the case at bar in order to resolve such discrepancy.

CONCLUSION

The writ of certiorari should be granted.

Respectfully submitted,

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August 4, 1978

APPENDIX

Opinion of The Court of Appeals

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 729—September Term, 1977.

(Argued February 21, 1978 Decided May 15, 1978.)

Docket No. 77-1425

UNITED STATES OF AMERICA,

Appellee,

—against—

MICHAEL CAPANEGRO,

Defendant-Appellant.

Before:

FRIENDLY, MULLIGAN and MESKILL,

Circuit Judges.

Appeal from a judgment of conviction entered in the United States District Court for the Southern District of New York, Hon. Thomas P. Griesa, *Judge*, on seventeen counts of violating 29 U.S.C. § 501(c), theft of a labor organization's funds.

Affirmed.

DON D. BUCHWALD, Assistant United States Attorney (Robert B. Fiske, Jr., United States Attorney for the Southern District of New York, Pamela Chepiga, Richard

Weinberg, Asst. United States Attorneys, of Counsel), *for Appellee.*

HENRY PUTZEL, III, New York, New York (Donna M. Zerbo, Law Student Assistant; Michael J. Capanegro, Pro Se, of Counsel), *for Defendant-Appellant.*

MULLIGAN, *Circuit Judge:*

This is an appeal by Michael Capanegro from a judgment of conviction entered on October 23, 1977 in the United States District Court for the Southern District of New York, after a 10 day trial before Hon. Thomas P. Griesa, United States District Judge, sitting without a jury. An indictment filed on September 24, 1976 charged Capanegro with 24 counts of embezzling, abstracting and converting monies of Local 1101 (Local or Union) of the Communication Workers of America (C.W.A.) in violation of 29 U.S.C. § 501(c). On July 7, 1977 the court found the defendant guilty on 17 counts and not guilty on seven counts. Judge Griesa filed special findings of fact on July 19, 1977. On October 13, 1977 Capanegro was sentenced to concurrent terms of imprisonment of one year and a day on each count.

In early 1971 appellant represented without fee Ricky Carnivale, who was challenging the incumbent for the presidency of the Local. The campaign was successful and a Carnivale slate of officers was certified in April, 1971. From that point through December, 1972 Michael Capanegro was retained as attorney for the Union at a $25,000 annual retainer. In June, 1971 the members of the Union voted to pay the legal fees of 18 members who had been arrested for actions committed during a 13 day wildcat strike. The membership further voted to pay the legal

fees of any member arrested for strike activities in the future. On July 14, 1971 the Local went on strike against the New York Telephone Company; the strike lasted until February 18, 1972. During that period about 45 Union members were arrested for strike-related crimes. Although a few were arrested for the felony of assault, the vast majority were charged with such state misdemeanors or offenses as disorderly conduct or harassment. As each arrest occurred the Local's officers either referred the member to Capanegro or advised the attorney of the incident. Capanegro then submitted legal bills to the Union for his alleged representation. These bills were paid from the Local's Defense Fund which was in part financed by the parent union C.W.A. Between October 21, 1971 and February 29, 1972, in addition to his regular fees under the Retainer Agreement, Capanegro received 45 checks totalling $113,025 from the Local's Defense Fund. Capanegro's bills for alleged legal services were sent directly to Carnivale; no copy was sent to the individual member allegedly represented. Carnivale signed all of the checks; indeed, over $100,000 of the Defense Fund checks were actually written out by Carnivale instead of by the "check writers" of the Defense Fund Committee, the usual practice. After the strike, the extent of Capanegro's billings eventually became known to the parent union as well as the Local. An audit was conducted and Capanegro's bills were brought to the attention of the Department of Labor in 1973. As the result of a criminal investigation, this indictment followed.

I

Each of the 24 counts of the indictment related to Capanegro's billing and subsequent receipt of payment for alleged legal fees incurred while representing individual

Union members. In finding Capanegro guilty on 17 counts of embezzling, stealing, willfully abstracting or converting to his own use the funds of the Union in violation of § 501(c), Judge Griesa wrote a carefully detailed 34 page opinion finding facts specially as requested by the defendant pursuant to Fed. R. Crim. P. 23(c). The opinion examined the facts and circumstances underlying each count of the indictment.

Appellant argues that the evidence failed to support the guilty verdicts. Under the familiar rubric the evidence must be viewed in the light most favorable to the Government. *Glasser* v. *United States*, 315 U.S. 60, 80 (1942). In this light, or almost any other form of illumination, the appellant's argument on this point is, at best, unconvincing.

An examination of the findings below reveals that in case after case Capanegro's bills were knowingly false. Each bill purported to provide a description of the services which he had rendered a particular member of the Local. In some cases appellant submitted bills for services to members whom he never saw or consulted. At least twice Capanegro's only service was to speak on the phone and advise the member to file a complaint with the police department. Yet in both cases he billed for appearances at hearings. On other occasions Capanegro made brief court appearances for members whose cases were adjourned in contemplation of dismissal. However, he billed for multiple court appearances including trial representation. He never prepared or filed a single brief or memorandum of law although in several cases he claimed that such services had been performed. Capanegro consistently claimed to have made appearances at police stations, at hearings, and also to have held conferences with witnesses when none of these events had actually transpired. In some cases appellant claimed to have represented members who in fact were represented by other counsel. A review

of all the counts upon which Capanegro was found guilty discloses that as to each Judge Griesa found the statement of defendant's services was almost entirely a statement of services which had not been rendered. Nor were the statements good faith estimates of services to be performed. We see no purpose in further discussion of individual counts since the evidence fully established a brazen scheme of looting the Union coffers.

On appeal it is argued that the Government offered no evidence that Capanegro's bills were so outrageously high as to constitute fraud. In support of this we are told that the law is "a profession which lacks any real standards concerning the amount of money it bills its clients." The obvious answer, of course, is that an attorney under any standard cannot bill a client for services neither performed nor ever intended to be performed.

Capanegro did testify on his own behalf, generally maintaining that his bills were a good faith estimate of services rendered. Appellant now claims that Judge Griesa's acquittal of Capanegro on seven counts rendered the verdict of guilty on 17 others inconsistent, thus requiring reversal. The point is totally frivolous. Judge Griesa carefully weighed the Government's evidence with respect to each count and found that in some the Government's case did not persuade him beyond a reasonable doubt. The convictions here were amply supported, indeed, compelled by the evidence. That the trial judge saw fit to acquit appellant on seven counts attests to a careful weighing of the testimony and other evidence on each count rather than to any inconsistency.[1]

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1 On this point appellant relies solely on *United States* v. *Maybury*, 274 F.2d 899 (2d Cir. 1960) (Friendly, *J.*). In that case, the appellate court found a verdict of guilty on an uttering count inconsistent with an acquittal on a forgery count. The trial judge had found that the defendant had forged the check for the purpose of proving knowledge of forgery for the uttering charge; yet he acquitted the defendant on the

II

The principal issue on this appeal[2] is whether Capanegro was employed by the Union within the language of § 501(c). That section provides:

> *Any person* who embezzles, steals, or unlawfully and willfully abstracts or converts to his own use, or the use of another, any of the moneys, funds, securities, property, or other assets of a labor organization of which he is an officer, or *by which he is employed,* directly or indirectly, shall be fined not more than $10,000 or imprisoned for not more than five years, or both.

(Emphasis supplied).

Capanegro was clearly "employed" by the Union. The retainer agreement of June 10, 1971 provided in part:

> 1. The client does hereby employ and retain the attorney [Capanegro] as its attorney for and during a period commencing on the 1st day of April, 1971 and shall continue for as long as Ricky Carnivale, President, shall remain in office.
>
> 2. The attorney accepts such employment and retainer and agrees to render and perform all legal services necessary or proper for the protection of the interests and property of the client whenever and to the extent required by such client. . . .

Carnivale or other Union officers either referred members to Capanegro for legal assistance or advised him that a member had been involved in some incident related to the strike. Appellant's fees were not paid by Union members referred to him but by his employer, the Union. In the only legal papers submitted by Capanegro to courts in his representation of the strikers, affidavits for adjournment, he described himself as "Chief Counsel to the Communications Workers of America, Local 1101." Appellant's relationship with the Union was not casual or happenstance. His affidavit indicates that he was at the Local's office "daily and working on union business." He spoke at Union gatherings. For the year 1972, 76% of his gross professional income was derived from the Union.

In sum, Capanegro by express agreement and in fact was employed by the Union. We have no difficulty therefore in holding that Capanegro was employed by the Union within the meaning of § 501(c).[3]

Appellant's argument to the contrary is that Capanegro was not an "employee" of the Union (i.e., he was not on the

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forgery charge. Clearly, no such internal inconsistency is present here since each count referred to individual transactions between Capanegro and his client.

2 Appellant has raised several other arguments—insufficiency of the evidence, inconsistent verdict—which are discussed in the text. In addition, we do not overlook appellant's claim that the settlement of a civil suit, brought by members of the Union against him and based upon the same factual issues here litigated, constitutes a collateral estoppel against this criminal prosecution brought by the United States. The law of course is contrary. *Ashe* v. *Swenson*, 397 U.S. 436 (1970); *United States* v. *Tramunti*, 500 F.2d 1334, 1346-49 (2d Cir.), cert. denied, 419 U.S. 1079 (1974).

3 The Government urges that if Capanegro was not employed directly by the Union he was at least "indirectly" so employed within the language of § 501(c). This argument rests upon the assumption that the words "directly or indirectly" in the statute modify the verb employed. There is some indication, however, in our prior opinion in *United States* v. *Robinson*, 512 F.2d 491, 494 (2d Cir. 1975), that those words modify embezzle, steal, abstract or convert. For its interpretation, the Government relies upon a report of the Department of Labor commenting on a predecessor bill to that which eventually became § 501(c). That report indicated that the Department construed the section to apply to persons having "any direct or indirect functions in connection with the money or other property of a labor organization . . . ." 104 Cong. Rec. 1327 (Jan. 30, 1958). We need take no position on this point since in our view Capanegro was in any event directly employed by the Union.

Union payroll and no usual employee deductions were taken from his fees by the Union). Rather, he argues, as attorney he was an "independent contractor" and hence not within § 501(c). We agree that Capanegro as retained counsel of the Union was not its "employee" in the common law sense of a servant as distinguished from an independent contractor. But the statute we are construing does not limits its coverage to officers or employees of a labor organization. It specifically provides for the criminal liability of "[*a*]*ny person*" who loots the funds of a union "*by which he is employed*" (emphasis supplied). A labor union like any other employer may employ independent contractors as well as servants or employees. See, e.g., A.L.I., Restatement of Agency § 220 (2)(b) (1933); Black's Law Dictionary 911 (4th ed. 1968) (independent contractor); Harper The Basis of Immunity of an Employer of an Independent Contractor, 10 Ind. L.J. 494 (1935); Morris, The Torts of an Independent Contractor, 29 Ill. L. Rev. 339, 341 (1934); Smith, Scope of the Business: The Borrowed Servant Problem, 38 Mich. L. Rev. 1222, 1246 (1940); Steffen, Independent Contractor and the Good Life, 2 U. of Chi. L. Rev. 501, 502-03 (1935).

However, the common law distinction between these classifications is irrelevant to the question in this case. The issue here is not the vicarious tort liability foisted upon a master by virtue of the unauthorized activity of his servant. Such liability is based on familiar *respondeat superior* concepts which lead to exculpation where the person employed performs the work without being subject to the control of his employer. The lawyer, like the physician, is a professional and if he is guilty of malpractice it may well be that under common law doctrine his employer will not be responsible in damages to one injured as the result of the lawyer's tortious activity. Cf. Birnbaum, Physicians

Counterattack: Liability of Lawyers for Instituting Unjustified Medical Malpractice Actions, 45 Fordham L. Rev. 1003, 1026 n.126 (1977). Here we are construing a statute enacted by Congress to protect union funds against pilferage by any person it employed. Capanegro was given such employment by the Union as its Chief Counsel. This employment provided him with the opportunity, which he clearly seized, to take illicit advantage of Union funds. Whether he was an independent contractor, agent, or servant, was not the concern of Congress. This is clear from the language which Congress chose in § 501(c).

The failure of Congress to use the word "employee" in § 501(c), and its provision instead for criminal liability for any person employed by the labor organization, is of some significance. The definition of employee in 29 U.S.C. § 152 (3)[4] expressly excludes independent contractors. The exclusion was added by the Taft-Hartley Act in 1947, 61 Stat. 137, in response to *N.L.R.B.* v. *Hearst Publications, Inc.*, 322 U.S. 111 (1944), H. Rep. No. 245 on H.R. 3020, 80th Cong., 1st Sess., 18 (1947), to clarify the congressional intent that the term "employee" be understood in its common

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4 29 U.S.C. § 152(3) states:

> The term "employee" shall include any employee, and shall not be limited to the employees of a particular employer, unless this subchapter explicitly states otherwise, and shall include any individual whose work has ceased as a consequence of, or in connection with, any current labor dispute or because of any unfair labor practice, and who has not obtained any other regular and substantially equivalent employment, but shall not include any individual employed as an agricultural laborer, or in the domestic service of any family or person at his home, or any individual employed by his parent or spouse, *or any individual having the status of an independent contractor, or any individual employed as a supervisor, or any individual employed by an employer subject to the Railway Labor Act, as amended from time to time or by any other person who is not an employer as herein defined.*

(Emphasis supplied.)

law sense as a salaried person working under direct supervision. In determining the group with which an employer must bargain on issues such as wages, hours and conditions of employment, 29 U.S.C. § 158(d), it makes sense to exclude independent contractors who depend not upon wages but a fee and who themselves decide how the work will be done. See H. Rep. No. 245, *supra*, at 18. On the other hand, the purpose of the Labor-Management Reporting and Disclosure Act of 1959, of which § 501(c) is a part, is not at all served by excluding from the coverage of that section a trusted legal advisor who is able to gain access to the union funds which the Act was designed to shelter.

Thus, in setting forth in § 501(a) the fiduciary obligations of officers of a union, the statute specifies "officers, agents, shop stewards, and other representatives of a labor organization." Again in § 501(b) the same listing is provided.[5] However, in § 501(c) the statute does not refer back to "such" persons but provides for criminal liability for "any person" employed by a union. Section 501(c) does not use the term "employee" which is defined in 29 U.S.C. § 402(f), but instead refers to any "person" broadly defined in 29 U.S.C. § 402(d).

In our view, the choice of language here is sufficiently flexible to include Capanegro's employment as Chief Counsel to the Union. We have heretofore affirmed the convictions under § 501(c) of defendants who held such relatively menial positions as Patrolman and Master-at-Arms of a labor organization. *United States* v. *Robinson*, 512 F.2d 491, 492 (2d Cir. 1975). It would indeed be incongruous if the Union's Chief Counsel, who had a close relationship with the Union hierarchy and obvious access to the till,

5 Whether Capanegro would be liable in a civil suit for damages under § 501(b) as a representative of the Union is not before us.

were to escape the liabilities imposed by § 501(c) because he was technically not on the Union payroll but was employed as its counsel. The clear intent of Congress, in view of the purpose of the legislation as well as the language of the statute, mandates the conclusion that Capanegro was a person employed by the Union and thus was within the coverage of § 501(c).[6]

6 In his dissenting opinion Judge Friendly cites cases where the courts, when faced with congressional use of the term employee or its "equivalent," have construed that language in the common law sense excluding independent contractors. However, in all of these cases the distinction served the statutory purpose. If the issue is whether the employer is responsible for the tort of his employee, *Strangi* v. *United States*, 211 F.2d 305 (5th Cir. 1954) (Federal Tort Claims Act), or whether an employee is to be compensated when injured during the course of his employment, *Baker* v. *Texas & Pacific Ry. Co.*, 359 U.S. 227 (1950) (FELA); *Cimorelli* v. *New York Cent. R. Co.*, 148 F.2d 575 (6th Cir. 1945) (FELA); or whether the pay, working conditions or unemployment tax payments of the employee are safeguarded, *Rutherford Food Corp.* v. *McComb*, 331 U.S. 722 (1947) (FLSA); *United States* v. *New England Coal & Coke Co.*, 318 F.2d 138 (1st Cir. 1963) (Walsh-Healey Act); I.R.C. §§ 3121(d)(2), 3306(i), then the degree of control exercised by the employer over the work performed and the job environment sensibly determines the employer's responsibility. The distinction between independent contractor and employee in those contexts is meaningful. But these cases have no relevance when the purpose of the statute is not to enforce some obligation upon the employer but rather to protect the funds of the union treasury from raids by those whose employment in a position of trust gives them access to those funds. In such cases it should make no difference whether the person employed is an employee or an independent contractor. The employer's degree of control over the thief is simply not relevant. As Mr. Justice Cardozo observed, "Our concern is to define the meaning [of the statutory term] for the purpose of a particular statute which must be read in light of the mischief to be corrected and the end to be attained." *Warner* v. *Goltra*, 293 U.S. 155, 158 (1934).

The purpose of the statute here was to discourage corruption by those employed in a position of trust by the union. 29 U.S.C. § 401. Had Capanegro been "house counsel" then the dissent apparently would concede that he would be criminally liable under § 501(c). The fact that he had his own outside office and employed his own secretary provides no reason at all to exempt him from that liability. A distinction made on this basis frustrates the congressional purpose by permitting the prohibited mischief to be easily achieved. Capanegro enjoyed a position of

Appellant also contends that it was the congressional intent to limit the reach of § 501(c) to insiders. This narrow target class, it is suggested, includes only "corrupt officers and employees, persons who—like any potential embezzlers—had inherent access to the funds and assets of a labor organization and authority to misappropriate them." The appellant argues that he had no authority since he had to submit his bills for approval to the Union.

Aside from the dubious factual postulate that Capanegro was not an insider in a rather choice position to loot the Union's funds, the legal argument is devoid of merit. Section 501(c) is not limited to the common law crime of embezzlement, which involves a misappropriation by one entrusted with funds. Indeed, the section, by its very terms, includes other forms of theft, stealing and converting. *United States* v. *Silverman,* 430 F.2d 106, 127 (2d Cir.), modified per curiam on other grounds, 439 F.2d 1198, cert. denied, 402 U.S. 953 (1971) (Friendly, *J.*). *United States* v. *Sullivan,* 498 F.2d 146 (1st Cir.), cert. denied, 419 U.S. 993 (1974) and *Colella* v. *United States,* 360 F.2d 792 (1st Cir.), cert. denied 385 U.S. 829 (1966), relied upon by appellant, are also contrary to his position. In *Sullivan* the court commented:

> Though common law embezzlement "carries with it the concept of breach of fiduciary relationship," . . . neither "stealing," "abstraction," nor "conversion" do. We see no reason grounded in policy or logic to extend to these terms a requirement of breach of fiduciary responsibility.

498 F.2d at 149 n.4. Neither do we.

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trust in his employment as an attorney which he egregiously abused and he should not be permitted to escape by mechanical recourse to a hoary common law rubric which is totally inappropriate here.

The fact that Capanegro's bills had to be passed upon by the Union is not at all pertinent. As Judge Friendly observed in *Silverman,* "the 'union' presumably would have objected if it had been able to speak freely." 430 F.2d at 127. In *United States* v. *Dibrizzi,* 393 F.2d 642 (2d Cir. 1968) which also involved a § 501(c) violation, we held that even if payments were authorized by the union, it did not absolve a union official charged with conversion of union funds. "When one sends the union a voucher known to be an improper one, and then receives payment of the voucher, the crime is completed." Id. at 645.

Appellant reminds us that in construing a criminal statute we should not enlarge its reach beyond the language employed by the statute. *Morissette* v. *United States,* 342 U.S. 246, 263 (1952). We agree. But the statute, in our view, clearly provides that a person employed by the Union under the circumstances we have set forth is unambiguously within its coverage. The Supreme Court has recently noted,

> It is true that "ambiguity concerning the ambit of criminal statutes should be resolved in favor of lenity . . . ." But here the Congress has conveyed its purpose clearly, and we decline to manufacture ambiguity where none exists.

United States v. *Culvert,* —— U.S. ——, 46 U.S.L.W. 4259, 4261 (March 28, 1978).

Judgment affirmed.

FRIENDLY, *Circuit Judge, dissenting:*

Judge Griesa was abundantly justified in concluding that Capanegro had been a party to a plan for embezzling, ab-

stracting and converting the funds of Local 1101 of the Communication Workers of America. If the Government had procured an indictment charging that Carnivale had violated 29 U.S.C. § 501(c) and that Capanegro had aided and abetted him, I would have no hesitation in affirming a conviction. However, the Government chose instead to charge Capanegro as principal and thereby raise the question whether § 501(c) includes a person whose relationship to the union is solely that of an independent contractor. With respect I cannot agree with the majority's conclusion that if does if his relationship with the union is close enough.

Although the majority concedes that "Capanegro as retained counsel of the Union was not its 'employee' in the common law sense of a servant as distinguished from an independent contractor," it is worth emphasizing how well-advised the concession is. Neither the retainer agreement quoted *ante* at pages 3042-43, nor Capanegro's references to himself as the Union's chief counsel, nor any other aspect of the relationship between Capanegro and the Union removes him from the common law description of an independent contractor as a person "who contracts with another to do something for him but who is not controlled by the other nor subject to the other's right of control with respect to his physical conduct in the performance of the undertaking." Restatement Second of Agency § 2(2) (1958); see *Logue* v. *United States*, 412 U.S. 521, 527 (1973); *Radio City Music Hall Corp.* v. *United States*, 135 F.2d 715 (2 Cir. 1943) (L. Hand, *J.*). In *Avis Rent a Car System, Inc.* v. *United States*, 503 F.2d 423, 429 (2 Cir. 1974), we laid out some of the other applicable criteria: whether the person rendering service has a substantial investment in his own tools or equipment; whether he undertakes a substantial cost, as by employing his own laborers; whether he

has an opportunity to profit depending on his management skill; whether the relationship between the person rendering the service and the person receiving it is permanent; and whether the person rendering the service works in the ordinary course of the recipient's business rather than in an ancillary capacity. See also *NLRB* v. *United Insurance Co.*, 390 U.S. 254, 259 (1968); Restatement Second of Agency § 220. The evidence here was that Capanegro maintained his own office and employed a secretary, and that he possessed a "special skill" upon which his opportunity to profit depended. It is of no moment that services like Capanegro's could equally well have been rendered by house counsel. That was not the relationship here.

As I understand it, the majority would agree that Capanegro would not fall within § 501(c) if that section had been worded "Any officer or employee who embezzles, steals" etc. "assets of a labor organization of which he is an officer or employee. . . ." Its conclusion that "the statute we are construing does not limit its coverage to officers or employees of a labor organization," rests primarily on the basis that the draftsman applied the prohibition to "any person" who embezzles or steals from a labor organization "by which he is employed." This method of drafting, it is argued, evidences an intention of Congress to avoid use of the term "employee", with its attendant common law connotations, in favor of a broader usage of the term "employ" which would include all persons hired by a union as independent contractors—lawyers, accountants, physicians, architects, builders of union headquarters, etc.—provided their relationship with the union is sufficiently intimate.

In the absence of any legislative history to support such a conclusion,[1] this is attributing altogether too much sig-

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1 Such legislative history as exists is to the contrary. Congress did not enact proposed versions of the LMRDA that would have exposed to

nificance to what on its face appears to be only a draftsman's choice. When Congress meant to go beyond officers and employees in imposing criminal liability for the misapplication of funds, it has not left the matter to ambiguous inference. See 18 U.S.C. §§ 656 and 657 ("Whoever, being an officer, director, agent or employee of, or connected in any capacity with" . . .).

The conclusion that Congress would have given a much clearer signal if it had intended § 501(c) to include independent contractors is fortified by history with respect to related statutes. When Congress has used the term "employee" or its equivalent, the courts have generally confined it to its common law meaning; in those instances where the courts have gone further, Congress has corrected them. Examples of the attitude first described are *Cimorelli* v. *New York Central R.R.*, 148 F.2d 575, 577-78 (6 Cir. 1945), (provision of the Federal Employers' Liability Act, 45 U.S.C. § 51, that "[e]very common carrier by railroad . . . shall be liable in damages to any person suffering injury while he is employed by such carrier," described "the conventional relationship of employer and employee" and excluded independent contractors); see also *Baker* v. *Texas & Pacific Ry. Co.*, 359 U.S. 227 (1959) (Federal Employers' Liability Act); *Rutherford Food Corp.* v. *McComb*, 331 U.S. 722 (1947) (Fair Labor Standards Act); *United States* v. *New England Coal and Coke Co.*, 318 F.2d 138, 143-44 (1 Cir. 1963) (phrase "all persons employed by the contractor," in the Walsh-Healy Act

criminal liability anyone "engaged directly or indirectly in or connected in any capacity with (i) the administration, management, or control of money or other property of a labor organization . . .," S. 748, 86th Cong., 1st Sess. § 412(a) (1959); H.R. 4473, 86th Cong., 1st Sess. § 215 (1959), or broader yet, "any person" whether or not employed by a labor organization, S. 1137, 86th Cong., 1st Sess. § 407 (1959); H.R. 7265, 86th Cong., 1st Sess. § 306 (1959).

41 U.S.C. § 35(b) was not intended to embrace persons who were independent contractors); *Strangi* v. *United States*, 211 F.2d 305 (5 Cir. 1954) (Federal Tort Claims Act). An example of the latter is the 1948 amendments to the Social Security Act and the relevant sections of the Internal Revenue Code which overruled the expansive construction given in *United States* v. *Silk*, 331 U.S. 704 (1947) and *Bartels* v. *Birmingham*, 332 U.S. 126 (1947), and tied the definition of "employee" to common law standards, 62 Stat. 438, now codified at I.R.C. §§ 3121(d)(2), 3306(i); see 42 U.S.C. § 410(j), in what the Senate Report termed a "reassertion of Congressional intent regarding the application of the act." S. Rep. No. 1255, 80th Cong., 2d Sess. 7 (1948). See *United States* v. *W. M. Webb, Inc.*, 397 U.S. 179, 182-90 (1970). An example still more pertinent to this case was the overruling of *NLRB* v. *Hearst Publications, Inc.*, 322 U.S. 111, 129 (1944). There the Court, pursuing a line of argument of which the majority's opinion is quite reminiscent, stated that the barebones definition of employee in § 2(3) of the NLRA left "no doubt that its applicability is to be determined broadly, in doubtful situations by underlying economic facts rather than technically and exclusively by previously established legal classifications," and upheld the NLRB's determination that newsboys distributing papers on a commission basis and subject to various supervisory controls were the papers' employees—a view which surely made sense in the statutory context. Nonetheless, in the Taft-Hartley Act Congress amended § 2(3) expressly to exclude independent contractors. The House report which accompanied the statute used unusually strong terms with respect to the *Hearst* decision.

An "employee", according to all standard dictionaries, according to the law as the courts have stated

it, and according to the understanding of almost everyone, with the exception of members of the National Labor Relations Board, means someone who works for another for hire. But in the case of *National Labor Relations Board* v. *Hearst Publications, Inc.* (322 U.S. 111 (1944)), the Board expanded the definition of the term "employee" beyond anything that it ever had included before, and the Supreme Court, relying upon the theoretic "expertness" of the Board, upheld the Board. In this case the Board held independent merchants who bought newspapers from the publisher and hired people to sell them to be "employees". The people the merchants hired to sell the papers were "employees" of the merchants, but holding the merchants to be "employees" of the publisher of the papers was most far reaching. It must be presumed that when Congress passed the Labor Act, it intended words it used to have the meanings that they had when Congress passed the act, not new meanings that, 9 years later, the Labor Board might think up. In the law, there always has been a difference, and a big difference, between "employees" and "independent contractors". "Employees" work for wages or salaries under direct supervision. "Independent contractors" undertake to do a job for a price, decide how the work will be done, usually hire others to do the work, and depend for their income not upon wages, but upon the difference between what they pay for goods, materials, and labor and what they receive for the end result, that is, upon profits. It is inconceivable that Congress, when it passed the act, authorized the Board to give to every word in the act whatever meaning it wished. On the contrary, Congress intended then, and it intends now, that the Board give to words not far-

> fetched meanings but ordinary meanings. To correct what the Board has done, and what the Supreme Court, putting misplaced reliance upon the Board's expertness, has approved, the bill excludes "independent contractors" from the definition of "employee".

H. R. Rep. No. 245, 80th Cong., 1st Sess. 18 (1947). While Congress did not repeat the express exclusion of independent contractors in the definition of "employee" in § 402(f) the LMRDA,[2] this was doubtless because it saw no need to reiterate what it had so plainly said. Indeed, the majority does not contend that Capanegro was an "employee" as defined in § 402(f).

What is ultimately dispositive is that § 501(c) is a criminal provision and thus implicates Justice Jackson's warning in *Morissette* v. *United States*, 342 U.S. 246, 263 (1952) (footnote omitted):

> The spirit of the doctrine which denies to the federal judiciary power to create crimes forthrightly admonishes that we should not enlarge the reach of enacted crimes by constituting them from anything less than the incriminating components contemplated by the words used in the statute. And where Congress borrows terms of art in which are accumulated the legal tradition and meaning of centuries of practice, it presumably knows and adopts the cluster of ideas that were attached to each borrowed word in the body of learning from which it was taken and the

2 This reads:

> (f) "Employee" means any individual employed by an employer, and includes any individual whose work has ceased as a consequence of, or in connection with, any current labor dispute or because of any unfair labor practice or because of exclusion or expulsion from a labor organization in any manner or for any reason inconsistent with the requirements of this chapter.

> meaning its use will convey to the judicial mind unless otherwise instructed. In such case, absence of contrary direction may be taken as satisfaction with widely accepted definitions, not as a departure from them.

Cf. *United States* v. *Ferrara,* 451 F.2d 91, 95 (2 Cir. 1971), *cert. denied,* 405 U.S. 1032 (1972); and *United States* v. *Ottley,* 509 F.2d 667, 672 & n.7 (2 Cir. 1975) (applying *Morissette* in interpreting criminal provisions of LMRDA). The wisdom of this statement is illustrated by the consequences of ignoring it. Instead of being able to refer to a well-developed body of law which provides a basis on which criminal liability can be determined, trial judges and juries must now minutely scrutinize the relationships of independent contractors to unions to determine if they are close enough for the statute to apply. The majority supplies no real clue as to when "employee" in § 501(c) is to be taken in its common law context and when it is not. I am baffled how the majority can conclude that a criminal statute requiring such an inquiry to determine whether a person is subject to it could pass muster under such cases as *Lanzetta* v. *New Jersey,* 306 U.S. 451, 453 (1939) and *United States* v. *Harriss,* 347 U.S. 612, 617 (1954). At the very least such an interpretation of § 501(c) raises constitutional doubts which a court should avoid. Furthermore, the majority seems to have involved itself in the anomaly of giving the criminal provision, § 501(c), a broader sweep than the civil ones, §§ 501(a) and (b), since Capanegro could be brought under these only by characterizing him as a "representative" of a labor organization—a tour de force in which the majority is as yet unwilling to engage. See footnote 5 to majority opinion. The understandable desire that Capanegro should not escape criminal punishment should not lead us to extend the statute beyond what Congress directed.

I would reverse the conviction with instructions to dismiss the indictment on the ground that Capanegro was not a person employed by a union as required by § 501(c).

Judgment of the Court of Appeals

UNITED STATES COURT OF APPEALS
SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Court House, in the City of New York, on the 15th day of May, one thousand nine hundred and seventy-eight.

Present: HONORABLE HENRY J. FRIENDLY
HONORABLE WILLIAM H. MULLIGAN
HONORABLE THOMAS J. MESKILL
Circuit Judges.

77-1425

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

—v.—

MICHAEL J. CAPANEGRO,
Defendant-Appellant.

Appeal from the United States District Court for the Southern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the judgment of said District Court be and it hereby is affirmed in accordance with the opinion of this court.

A. DANIEL FUSARO
Clerk
By ARTHUR HELLER
Deputy Clerk

Order Denying Petition for Rehearing

UNITED STATES COURT OF APPEALS
SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Court House, in the City of New York, on the fifth day of July, one thousand nine hundred and seventy-eight.

Present: HONORABLE WILLIAM H. MULLIGAN
HONORABLE HENRY J. FRIENDLY
HONORABLE THOMAS J. MESKILL
Circuit Judges.

77-1425

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

—v.—

MICHAEL J. CAPANEGRO,
Defendant-Appellant.

A petition for a rehearing having been filed herein by counsel for the appellant Michael J. Capanegro.

Upon consideration thereof, it is

Ordered that said petition be and it hereby is DENIED.

A. DANIEL FUSARO
Clerk

Order Denying Petition for Rehearing *en banc*

UNITED STATES COURT OF APPEALS
SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Court House, in the City of New York, on the fifth day of July, one thousand nine hundred and seventy-eight.

77-1425

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

—v.—

MICHAEL J. CAPANEGRO,
Defendant-Appellant.

A petition for rehearing containing a suggestion that the action be reheard en banc having been filed herein by counsel for the appellant Michael J. Capanegro, and no active judge or judge who was a member of the panel having requested that a vote be taken on said suggestion,

Upon consideration thereof, it is

Ordered that said petition be and it hereby is DENIED.

/s/ IRVING R. KAUFMAN
IRVING R. KAUFMAN, Chief Judge

Special Findings of the District Court

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
76 Cr. 914

UNITED STATES OF AMERICA

—v.—

MICHAEL CAPANEGRO,
Defendant.

OPINION

GRIESA, J.

The indictment in this action charges 24 counts of violation of 29 U.S.C. § 501(c). The statute provides:

> *"Embezzlement of assets; penalty*
>
> (c) Any person who embezzles, steals, or unlawfully and willfully abstracts or converts to his own use, or the use of another, any of the moneys, funds, securities, property, or other assets of a labor organization of which he is an officer, or by which he is employed, directly or indirectly, shall be fined not more than $10,000 or imprisoned for not more than five years, or both."

Defendant Capanegro was tried by the court without a jury. Pursuant to Criminal Rule 23(c), the court announced general findings at the conclusion of the trial, and thereafter defense counsel requested that the facts be found specially.

Special Findings of the District Court

The general findings with respect to the various counts are:

Count	*Finding*
1	Guilty
2	Guilty
3	Guilty
4	Not Guilty
5	Guilty
6	Guilty
7	Guilty
8	Guilty
9	Not Guilty
10	Guilty
11	Guilty
12	Guilty
13	Not Guilty
14	Not Guilty
15	Guilty
16	Guilty
17	Guilty
18	Not Guilty
19	Not Guilty
20	Not Guilty
21	Guilty
22	Guilty
23	Guilty
24	Guilty

The purpose of this opinion is to find the facts specially as requested by defense counsel.

Unless otherwise noted, I find the following facts proved beyond a reasonable doubt.

Capanegro is an attorney. During the relevant period in 1971-72 Capanegro was counsel to Local 1101 of the

Special Findings of the District Court

Communication Workers of America, under a $25,000 per year retainer.

Commencing in the summer of 1971, and continuing until February 18, 1972, Local 1101 was on strike against New York Telephone Company.

The International Union of the Communication Workers of America had a so-called "Defense Fund." This fund was set up to take care of a variety of needs of a local union and its members during a strike. Expenses which might be paid out of the Defense Fund included legal bills of the union and members for matters arising out of the strike, and also other types of strike-related expenses.

The International Union made Defense Fund funds available to Local 1101 with respect to the 1971-72 strike against New York Telephone Company.

The present case arises out of legal fees collected by defendant from the Local 1101 Defense Fund during 1971 and 1972, over and above his regular retainer.

In the following description of the various counts in the indictment, the persons to whom legal services were rendered, or allegedly rendered, by Capanegro were members of Local 1101, unless otherwise noted.

First Count

On December 10, 1971 Capanegro rendered a bill to Local 1101, which included the following item:

> "FOR PROFESSIONAL SERVICES RENDERED IN RE: MICHAEL ROSSO
>
> As and for all negotiations and conferences; appearances at Police Station;

appearances in Court; preparation for trial and appearances on Trial Dates for Criminal charges in Riverhead: 1,850.00"

Capanegro received payment of this amount from Local 1101 on December 16, 1971.

Rosso was arrested December 3, 1971 in Suffolk County and charged with disorderly conduct, which is a "Violation", as distinct from either a felony or a misdemeanor. Rosso received a summons to appear in court December 8. He appeared on that date with a friend, and without any lawyer. He then consulted Local 1101, and was given Capanegro's telephone number. Rosso spoke to Capanegro for a few minutes in one or two telephone calls, in which Capanegro stated that he would not handle the case because it would be tried in Suffolk County. Capanegro referred the matter to a Suffolk attorney, John Clayton. Capanegro spoke to Clayton, and told him that the legal fee would be paid by the union and wanted it to be nominal. Clayton agreed to charge $250. Capanegro paid Clayton the $250 on January 4, 1972. Clayton represented Rosso, and on March 24, 1972 Rosso received an Adjournment in Contemplation of Dismissal ("ACD").

It is not clear whether Capanegro's bill was sent before or after there had been an agreement with Clayton for the $250 charge. However, Capanegro has admitted that at the time of the bill he had no intention of handling the matter personally and intended to bring in another attorney.

I find that Capanegro submitted the Rosso item knowing that it was almost entirely a statement of services which he had not rendered and had no intention of rendering. I find that Capanegro obtained payment of $1850 which he knew he was not entitled to. Moreover,

after he had paid the $250 to Clayton, Capanegro failed to send a corrected bill to Local 1101 or to refund to Local 1101 any part of the remaining $1,600.

Counts 2 and 3

On December 16, 1971 Capanegro submitted a bill to Local 1101 for the following items:

"FOR PROFESSIONAL SERVICES RENDERED IN RE: LLOYD HAROLD AND FRANK CARLO

As and for all negotiations and conferences; appearances in Court; Preparation for Trial and appearances on trial dates for Criminal Charges in re LLOYD HAROLD; $1300.00

As and for all negotiations and conferences; appearances in Court; Preparation for Trial and appearances on Trial dates for Criminal Charges in re FRANK CARLO: 1300.00

Total Due $2600.00"

Capanegro received payment of this amount from Local 1101 on the day the bill was submitted.

Lloyd Harold and Frank Carlo were arrested on December 13, 1971 and charged with Disorderly Conduct and Harassment—both being "Violations". They were released and told to appear in court December 22, 1971. Both Harold and Carlo spoke to Ricky Carnivale, president of Local 1101, who referred them to Capanegro for legal assistance. Harold and Carlo spoke to Capanegro's secretary (not to Capanegro), and Harold was given an affidavit to take to court requesting an adjournment.

Harold and Carlo went to court on December 22, and for some reason did not present the adjournment affidavit. Carlo called the union and complained about not having a lawyer in court. A lawyer named Udoff, who normally handles workmen's compensation matters, came to court. Udoff represented Harold and Carlo in a brief hearing before the judge, who granted ACD's to both men.

Capanegro testified that he spoke to Harold on the telephone December 14 or December 15, and that he probably spoke to the Assistant District Attorney prior to the court date. I will give Capanegro the benefit of the doubt as to conversing with Harold, but I reject the contention that the defendant talked to the Assistant District Attorney.

Capanegro contends that the Harold and Carlo bill, like several others involved in the indictment, was one of the bills which he prepared shortly after the opening of a case, and that it reflected his estimate of the value of the services based on the nature of the offense, and his estimate as to what work would be required.

I find that Capanegro submitted this bill knowing that it was almost entirely a statement of services which had not been rendered. Separate items were written for Harold and Carlo, on what was the same case, in order to inflate the amount of the bill. I reject the contention that the bill should be interpreted as, or was intended as, a good faith estimate of services to be performed. I find that Capanegro obtained payment of $2600 which he knew he was not entitled to.

Count 4

On January 7, 1972 Capanegro rendered a bill to Local 1101, which included the following item:

"FOR PROFESSIONAL SERVICES RENDERED IN RE:

AS AND FOR negotiations, conferences and advice in regard to Criminal Charges by Nick Fittipaldi, ROBERT AST, and DENNIS LINCOLN in re Telephone Company 1,000.00"

Capanegro received payment of this amount from Local 1101 on January 26, 1972.

Union members Fittipaldi, Ast and Lincoln were involved in an incident January 3, 1972 leading to criminal charges by them against certain other persons. The criminal prosecution was handled by one or more Assistant District Attornies. However, Capanegro conferred with Lincoln and also probably with Fittipaldi. Capanegro appeared in court January 6, 1972 and introduced the three complainants to an Assistant District Attorney.

I cannot find beyond a reasonable doubt that the description of services was false. As to the $1,000 fee, although it would appear high in relation to the amount of services performed, I cannot find beyond a reasonable doubt that Capanegro knew he was not entitled to this fee.

Count 5

Capanegro's bill of January 7, 1972 to Local 1101 included the following item:

> "AS AND FOR PROFESSIONAL SERVICES RENDERED IN RE:
>
> all conferences, negotiations and appearances at hearing; appearance at arraignment for charges involving Paul Radloff, felonious assault charges; advice and legal briefs in regard thereto: 1,075.00"

Capanegro received payment of this amount from Local 1101 on January 26, 1972.

A week or two before Christmas 1971 Radloff was brushed by a car while he was in a picket line. President Carnivale of Local 1101 referred him to Capanegro. Radloff talked to Capanegro on the telephone for about 15 minutes. Capanegro advised Radloff to file a complaint against the driver of the car. Capanegro told Radloff he would defend him if any charge was made against Radloff.

Capanegro did nothing further in the matter. Radloff did not file any complaint against the driver. No proceedings were taken by anyone against Radloff.

As of the time Capanegro rendered his bill on January 7, 1972 defendant knew that this was a matter where services might or might not be needed depending upon what, if anything, developed. Defendant was simply "available to this man" (Tr. 1110).

I find that Capanegro submitted the Radloff item knowing that it was almost entirely a statement of services which had not been rendered. This item was

not a good faith estimate of services to be performed. I find that Capanegro obtained payment of $1075 which he knew he was not entitled to.

Counts 6 and 7

On January 13, 1972 Capanegro rendered a bill to Local 1101, which included the following items:

> "FOR PROFESSIONAL SERVICES RENDERED IN RE: HAL DOLGIN
>
> As and for all negotiations, conferences, appearances in Court in regard to criminal Charges in re the above; appearance in Court and attendance at trial: $1,075.00
>
> FOR PROFESSIONAL SERVICES RENDERED IN RE:
>
> As and for all negotiations, conferences, advice, appearances in Court in regard to Criminal Charges with DUNCAN HEVENOR: 1,000.00"

Capanegro received payment of these amounts from Local 1101 on February 11, 1972.

Hevenor and Dolgin were involved in a scuffle at a picket line on January 10, 1972. The police advised making a complaint against one Sterling Hostern, as a protection against any complaint against Hevenor and Dolgin. Hevenor spoke to Carnivale, who said that the union lawyer would be in touch with Hevenor. No union lawyer ever communicated with Hevenor or Dolgin.

Nothing came of the case. The charge against Hostern was not pursued, and no proceedings were taken against Hevenor and Dolgin.

Capanegro testified that he was retained by the union to represent Hevenor and Dolgin. However, Capanegro performed no services of any substance.

I find that Capanegro submitted the items relating to Dolgin and Hevenor knowing that they were almost entirely statements of services which had not been rendered. Separate items were written for the two men in order to inflate the amount. These items were not good faith estimates of services to be performed. I find that Capanegro obtained payment of $2,075 which he knew he was not entitled to.

Count 8

On January 13, 1972 Capanegro rendered a bill to Local 1101, which included the following item:

"FOR PROFESSIONAL SERVICES RENDERED
IN RE: GIOSE FRANCO

As and for all negotiations, conferences, advice appearances in Court in regard to Criminal charges with Giose Franco: 750.00"

Capanegro received payment of this amount from Local 1101 on February 11, 1972.

On or about January 11, 1972 Franco was asked to come to a police station. When he arrived, he was told it was a mistake, but was asked by the police if he would answer questions about some incident. Franco refused to answer questions, and the matter went no further. A relative of Franco, but not a lawyer, was present at the police station.

Franco discussed the matter with a shop steward and with others at the union. He thought he would be receiving advice about a false arrest action, but no one called him about this, and the idea was dropped.

Capanegro was told of the incident either by someone at the union, or possibly by Franco. However, other than receiving this information, Capanegro performed no services.

I find that Capanegro submitted the Franco item knowing that it was almost entirely a statement of services which had not been rendered. This item was not a good faith estimate of services to be performed. I find that Capanegro obtained payment of $750 which he knew he was not entitled to.

Count 9

Capanegro's bill of January 13, 1972 to Local 1101 included the following item:

"FOR PROFESSIONAL SERVICES RENDERED
IN RE: ROBERT ZAPPULLA

As and for all negotiations, conferences in regard thereto; arrest for misdemeanor; Dismissal of same: $500.00"

Capanegro received payment of this amount from Local 1101 on February 11, 1972.

On January 7, 1972 Zappulla was involved in an incident relating to a telephone company truck. Zappulla was notified to appear at a police station. Before going to the station, he went to the union office, and was given the telephone number of Capanegro, whom he called. He told Capanegro about the circumstances, and Capanegro told him to deny everything at the police station, and to call back if he needed more help. Later, the police took Zappulla to the station, but released him. There were no further proceedings, and there was no further consultation with Capanegro.

Capanegro has testified that he made a telephone call to the police and negotiated Zappulla's release.

I cannot find beyond a reasonable doubt that defendant either falsified this item or charged more than he thought he was entitled to.

Count 10

Capanegro rendered a bill to Local 1101 dated January 14, 1972 containing the following item:

"FOR PROFESSIONAL SERVICES RENDERED
IN RE: JOHN HYLAND

As and for all negotiations, conferences and advice in regard to Criminal Charges involving JOHN HYLAND; appearances at hearing dates; Appearances at trial and adjourned dates: 950.00"

Capanegro received payment of this amount from Local 1101 on February 11, 1972.

On or about January 10, 1972, while Hyland was on picket duty, he was struck by a telephone company truck. Hyland telephoned Carnivale, who had Capanegro call Hyland. Capanegro advised Hyland to go to the police station and make a report. Hyland went to the station and filled out a complaint form. Nothing came of the case. Capanegro's expanation for this is that the driver of the truck could not be identified. Capanegro performed no further services after the telephone conversation, except speaking briefly to Hyland at the Playboy Club, and possibly also at Capanegro's office.

I find that Capanegro submitted the Hyland item knowing that it was almost entirely a statement of services which had not been rendered. This item was not a good faith estimate of services to be performed. I find that Capanegro obtained payment of $950 which he knew he was not entitled to.

Count 11

On January 31, 1972 Capanegro rendered a bill to Local 1101, which included the following item:

"FOR PROFESSIONAL SERVICES RENDERED
IN RE: JOSEPH CASSIDY

As and for all negotiations conferences, appearances in Court; preparation for Trial; appearance on trial dates and adjourned dates; trial of case: 1,375.00"

Capanegro received payment of this amount from Local 1101 on February 24, 1972.

Cassidy was arrested on January 14, 1972 in connection with a strike-related disturbance. He was charged with disorderly conduct. Cassidy called the union from the police station. He was taken to court the day of the arrest and told to appear again January 26. There was no lawyer for Cassidy at the police station, and a court-appointed lawyer represented him in the court proceeding on the day of the arrest.

The union gave Cassidy Capanegro's name. Cassidy conferred with Capanegro at his office. Capanegro agreed to represent Cassidy, but told Cassidy to get whatever witnesses were available, and have them appear in court.

Capanegro was in court with Cassidy on January 26. They waited about an hour to go before the judge. Cassidy telephoned the union from court about possible witnesses, but nothing came of this. When the matter came before the judge an ACD was granted, and that was the end of the case.

A union member by the name of Jacob Adler was arrested along with Cassidy in connection with the same incident. His case was handled on January 26, 1972

in the same proceeding with the case of Cassidy. The two cases were in effect one. In the bill of January 31, 1972 Capanegro included a separate item for Adler as follows:

"FOR PROFESSIONAL SERVICES RENDERED
IN RE: JACOB ADLER

As and for all negotiations, conferences appearances in Court; preparation for Trial; appearances on Trial Dates; and adjourned dates: 1,325.00"

Capanegro received payment of this amount on February 24, 1972.

For some reason, the Adler item is not specifically included in the charges in the indictment. However, evidence about Adler was received as bearing on the Cassidy item.

This is a situation in which Capanegro made a court appearance and achieved a successful disposition of a criminal case against union members. Nevertheless, I find that the description of services in the Cassidy item was intentionally exaggerated, by referring to multiple court appearances and an actual trial. Also the treatment of the Cassidy and Adler cases as two separate items was a device to inflate fees. I find that, by means of the bill in the Cassidy matter Capanegro knowingly obtained payment beyond what he was entitled to.

Count 12

Capanegro's bill of January 31, 1972 to Local 1101 contained the following item:

"FOR PROFESSIONAL SERVICES RENDERED
IN RE: JOHN TOOMEY

As and for all negotiations, conferences, appearances in Court; preparation for

trial on four Criminal Charges (misdemeanors) to wit: Criminal Possession of stolen property; Criminal tampering; Criminal Mischief and Larceny; appearances on Trial dates and adjourned dates; trial of case: 5,400.00"

Capanegro received payment of this amount from Local 1101 on February 24, 1972.

Toomey was arrested on January 19, 1972. He was at the Port Authority bus terminal and was caught breaking pay telephone dials off the telephones. Toomey was held overnight and taken to court the next morning, where he was represented by a Legal Aid lawyer and given a date to return to court—January 26.

The union referred Toomey to Capanegro. Toomey conferred with Capanegro at his office. Capanegro met Toomey in court on January 26. Capanegro arranged to have the case disposed of by a plea of guilty to a charge of disorderly conduct and restitution of $12.00 in payment for the dials.

Although this case again involves Capanegro's representation and court appearance leading to disposition of a criminal case, I find that both the description of services and the amount of the bill are grossly exaggerated, and were done so intentionally in order to obtain a fee which Capanegro knew he was not entitled to.

Special Findings of the District Court

Count 13

Capanegro's January 31, 1972 bill to Local 1101 included the following item:

"FOR PROFESSIONAL SERVICES RENDERED IN RE: ANTHONY CALIFRA

As and for all negotiations, conferences, appearances in Court; preparation for Trial; appearances on Trial dates and adjourned dates; trial of case: 1,550.00"

Capanegro received payment of this amount from Local 1101 on February 24, 1972.

Califra was arrested January 19, 1972 and charged with disorderly conduct in connection with a strike-related incident. He was taken to the police station and told to appear in court February 7 for trial. Califra reported the problem to Carnivale, who called Capanegro. Califra also may have talked to Capanegro at this time. Capanegro appeared with Califra in court on February 7. After a brief appearance before the judge, the case was dismissed.

The bill of January 31 recites certain services, such as court appearances and trial which had not been performed as of that time. However, as already indicated, Capanegro has advanced the theory that certain of the bills were good faith estimates of services to be performed, although, of course, they were not actually phrased as such.

Giving Capanegro the benefit of every reasonable doubt, I find that the Government has not proved beyond such a reasonable doubt that the Califra item was not a good faith estimate of the kind Capanegro describes.

Special Findings of the District Court

Count 14

Capanegro's bill of January 31, 1972 to Local 1101 contained the following item:

"FOR PROFESSIONAL SERVICES RENDERED MICHAEL BLOCK

As and for all negotiations, conferences, appearances in Court; preparation for trial; appearances on Trial dates and adjourned dates; trial of case: Criminal Mischief, 1st degree: 1,725.00"

Capanegro received payment of this amount from Local 1101 on February 24, 1972.

Block was arrested January 20, 1972 in connection with a strike-related incident. He was taken to a police station and told to appear in court January 27. Block described the situation to a shop steward at the union. He was referred to Capanegro, and they conferred at Capanegro's office. Capanegro gave Block an affidavit to present in court seeking an adjournment, which was granted. Following that there was a second adjournment, and the matter was finally set for March 24. On the latter date Capanegro appeared with Block. No one from the telephone company was present, and the judge dismissed the case.

My remarks in connection with Count 13 apply here. I cannot find beyond a reasonable doubt that the Block item was not a good faith estimate of services to be performed.

Special Findings of the District Court

Counts 15, 16 and 17

Capanegro's January 31, 1972 bill to Local 1101 contained the following three items:

"FOR PROFESSIONAL SERVICES RENDERED
IN RE: ROBERT NERI

As and for all negotiations, conferences, advice, appearances in Court in regard to Criminal charges; preparation of trial; appearances on Trial dates and adjourned dates; dismissal of same; 1,850.00

"FOR PROFESSIONAL SERVICES RENDERED
IN RE: THEODORE WALLEN

As and for all negotiations, conferences; preparation for trial; appearances on trial dates; & adjourned dates; dismissal of same: 2,000.00

"FOR PROFESSIONAL SERVICES RENDERED
IN RE: STEVEN DZUBAY

As and for all negotiations, conferences; advice; appearances in Court in regard to Criminal charges; preparation of Trial; appearances on Trial dates; and adjourned dates; dismissal of same: $1,850.00"

Capanegro was paid these amounts by Local 1101 on February 24, 1972.

Neri and Wallen were members of Local 1102, located on Staten Island. Dzubay was a member of Local 1101.

On January 12, 1972 all three were arrested for disorderly conduct in a demonstration near a telephone company building. They were taken to a police station and told to appear in court January 17, 1972.

Special Findings of the District Court

Wallen and Neri called an official of Local 1102, who said that he would arrange for a lawyer. On January 17 the three men, and witnesses they brought, appeared in court. Capanegro appeared to represent them. None of the men had spoken to Capanegro prior to the court appearance. Capanegro was apparently retained by Local 1101 as a result of discussions between Local 1101 and Local 1102.

While waiting in court, Capanegro interviewed Neri, Wallen and Dzubay, and also their witnesses. At an initial appearance before the judge, Capanegro asked to have the case dismissed, but this was not done. There was a wait of about two hours. In a second appearance before the judge, the Assistant District Attorney agreed to have the case dismissed, and the judge granted an ACD.

Capanegro billed separately for Neri, Wallen and Dzubay, although there was basically only one case. I find that the separate itemization and the description of services was intentionally calculated to collect a grossly exaggerated total fee of $5700, which Capanegro knew he was not entitled to.

Count 18

On February 17, 1972 Capanegro submitted a bill to Local 1101, which included the following item:

"FOR PROFESSIONAL SERVICES RENDERED
IN RE: PETER O'NEAL

As and for all negotiations, conferences, appearances in Court, preparation for trial appearances on adjourned dates; trial of case: $1,450.00"

Capanegro received payment of this amount from Local 1101 on February 29, 1972.

O'Neal was involved in a strike-related incident on January 27, 1972. He was arrested on February 2 while he was in court watching the trial of Bruce Whyte, another union member. Whyte was being represented by Capanegro. O'Neal told Capanegro about his arrest and had a brief conversation with Capanegro in the court building that day. O'Neal was told to be in court on his own case February 23. He obtained an affidavit from Capanegro's office on which an adjournment was obtained to March 13, 1972. Capanegro appeared with O'Neal in court on March 13, at which time Capanegro talked to the Assistant District Attorney and appeared before the judge. The judge granted an ACD.

My remarks in connection with Count 13 apply here. I cannot find beyond a reasonable doubt that the O'Neal item was not a good faith estimate of services to be performed.

Count 19

Capanegro's bill of February 17, 1972 to Local 1101 contained the following item:

> "FOR PROFESSIONAL SERVICES RENDERED
> IN RE: PEOPLE V. ROBERT POMPOSELLO
>
> As and for all negotiations, conferences, appearances in Court; appearances on adjourned dates; preparation for trial; Conferences with witnesses for trial of case: (Assault in the 3rd degree) 1,850.00"

Capanegro received payment of this amount from Local 1101 on February 29, 1972.

Pomposello became involved in an incident with another telephone company employee on January 18, 1972. On January 23 he was asked to go to the police station, where he was arrested and charged with third degree assault. He was told to appear in court on February 2.

Someone at Local 1101 gave Capanegro's name to Pomposello. Pomposello conferred with Capanegro at his office. The court hearing was adjourned to March 8. Pomposello and Capanegro appeared in court on March 8 and, against Capanegro's advice, Pomposello pleaded guilty to a reduced charge of harassment. Pomposello was given a conditional discharge.

My remarks in connection with Count 13 apply here. I cannot find beyond a reasonable doubt that the Pomposello item was not a good faith estimate of services to be performed.

Count 20

Capanegro's bill of February 17, 1972 included the following item:

> "FOR PROFESSIONAL SERVICES RENDERED
> IN RE: PEOPLE V. WALTER JASZCZUK
>
> As and for all negotiations, conferences, counselling, and advice in regard to pending charges which may be lodged against him: 250.00"

Capanegro received payment of this amount from Local 1101 on February 29, 1972.

Jaszczuk was called by the police for questioning in connection with a strike-related criminal matter. He was given Capanegro's number by the union. Jaszczuk went to the police station, was questioned, and no charges or other proceedings resulted. Jaszczuk testified that, prior to and after the trip to the police station, he spoke to Capanegro's secretary. Capanegro believes that Jaszczuk spoke to him personally.

I cannot find beyond a reasonable doubt that Capanegro billed more than he thought he was entitled to.

Special Findings of the District Court

Count 21

Capanegro's February 17, 1972 bill to Local 1101 included the following item:

"FOR PROFESSIONAL SERVICES RENDERED IN RE: PEOPLE V. WARREN LOPEZ

As and for all negotiations, conferences, advice, appearances in Court in regard to Criminal charges: 750.00"

Capanegro received payment of this amount from Local 1101 on February 29, 1972.

Toward the end of the strike Juan Lopez was involved in a scuffle with a telephone company foreman. He went to a police station because he heard that a complaint was filed against him. However, none had been, and he went home. He obtained Capanegro's telephone number from the union, and called Capanegro. He described the incident to Capanegro, who told him that, if the police came, Lopez should have his wife answer the door or otherwise try to avoid arrest. Capanegro said to call back if indeed Lopez was picked up. Nothing further happened in the matter, and Lopez never spoke to Capanegro again.

I find that Capanegro submitted the Lopez item knowing that it was almost entirely a statement of services which had not been rendered. This item was not a good faith estimate of services to be performed. I find that Capanegro obtained payment of $750.00 which he knew he was not entitled to.

Count 22

Capanegro's bill of February 17, 1972 to Local 1101 included the following item:

"FOR PROFESSIONAL SERVICES RENDERED IN RE: PEOPLE V. MICHAEL ANTONUCCI

Special Findings of the District Court

As and for all negotiations, conferences, advice, appearances in Court in regard to Criminal Charges: 875.00"

Capanegro received payment of this amount from Local 1101 on February 29, 1972.

On January 23, 1972 Antonucci got in a fight with a friend, which had nothing to do with the strike. A union official, Fitzgerald, heard that a warrant was out for Antonucci's arrest and told this to Capanegro. Capanegro spoke to Antonucci at the union office. However, Antonucci told Capanegro that he had his own lawyer. Antonucci's lawyer was named Schwartz. Capanegro performed no services in the case, and never communicated with Schwartz.

I find that Capanegro submitted the Antonucci item knowing that it was almost entirely a statement of services which had not been rendered. This item was not a good faith estimate of services to be performed. I find that Capanegro obtained payment of $875 which he knew he was not entitled to.

Count 23

Capanegro's bill of February 17, 1972 to Local 1101 included the following item:

"FOR PROFESSIONAL SERVICES RENDERED IN RE: JACK RUSSEK

As and for Conferences, Negotiations and Appearances at Hearing, Appearance at arraignment for charges involving Jack Russek; legal advice in regard thereto 675.00"

Capanegro received payment of this amount from Local 1101 on February 29, 1972.

On January 25, 1972 Russek was in a picket line in front of a telephone company garage. He was asked to move by the driver of a truck. When Russek did not move, the truck hit or brushed against Russek. Russek went to a police station and complained. Russek was told to appear in court on March 3. He called the union and was told to speak to Capanegro. He talked to Capanegro on the telephone for a few minutes. Capanegro told him that the Assistant District Attorney would handle the case. Russek had no further communication with Capanegro. Russek went to court alone on March 3 and dropped the charge.

I find that Capanegro submitted the Russek item knowing that it was almost entirely a statement of services which had not been rendered. This item was not a good faith estimate of services to be performed. I find that Capanegro obtained payment of $675 which he knew he was not entitled to.

Count 24

Capanegro's bill of February 17, 1972 to Local 1101 included the following item:

> "FOR PROFESSIONAL SERVICES RENDERED IN RE: JOSEPH McALEER
>
> As and for all negotiations, conferences, appearances in Court; preparation for trial; conference with witnesses and with client; appearances on trial dates and adjourned dates; trial of case; (Felony and Misdemeanor) $4,500.00"

Capanegro received payment of this amount from Local 1101 on February 29, 1972.

On January 31, 1972 McAleer was involved in a fight in a picket line. During the evening after the fight

McAleer was at a union meeting, and heard that the police were looking for him. He spoke to Capanegro briefly and told Capanegro that he expected to be arrested. McAleer went alone to the police station where he was arrested. He was released on bail. On February 3 McAleer met with Capanegro and discussed the case. Capanegro said that the case looked bad.

After this meeting McAleer decided he did not want Capanegro to represent him, and retained another lawyer by the name of Friedman. McAleer told this to Carnivale, but not to Capanegro. However, McAleer did not request any services from Capanegro prior to the date of Capanegro's bill, or ever.

The union paid a retainer to Friedman of $1,000 at the outset of Friedman's services.

In August 1972 Friedman made a written motion to dismiss the case, which was granted. By this time Capanegro was corresponding with Friedman in a contrived effort to act as "co-counsel" for the purpose of justifying Capanegro's undeserved fee of $4,500. Friedman billed the union an additional $1,500 for his own services, which bill he sent to Capanegro. Capanegro paid this bill out of his own funds. This left Capanegro with a net of $3,000, none of which he refunded to the union.

Capanegro knowingly billed for services he had not performed. This was not the case of a good faith estimate of services to be performed. At the very least, Capanegro should have refunded the $4500 to Local 1101 when he learned that Friedman was in the case, which was no later than mid-March. Capanegro's payment of $1500 to Friedman still left Capanegro with $3000 which he knew he was not entitled to.

Special Findings of the District Court

Conclusion

Within the meaning of 29 U.S.C. § 501(c), I find that Local 1101 was a labor organization and that Capanegro was employed by it. As to all counts on which I have found Capanegro guilty, I find that he unlawfully and willfully embezzled, stole, abstracted, or converted to his use funds of Local 1101 in violation of the statute.

Dated: New York, New York
July 19, 1977

/s/ THOMAS P. GRIESA
THOMAS P. GRIESA
U.S.D.J.

Supreme Court, U. S.
FILED
OCT 6 1978
MICHAEL RODAK, JR., CLERK

No. 78-193

In the Supreme Court of the United States

OCTOBER TERM, 1978

MICHAEL J. CAPANEGRO, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

WADE H. McCREE, JR.
Solicitor General

PHILIP B. HEYMANN
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In the Supreme Court of the United States

OCTOBER TERM, 1978

MICHAEL J. CAPANEGRO, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-21a) is reported at 576 F. 2d 973. The opinion of the district court (Pet. App. 25a-50a) is not reported.

JURISDICTION

The judgment of the court of appeals (Pet. App. 22a) was entered on May 15, 1978, and a petition for rehearing was denied on July 5, 1978 (Pet. App. 23a). The petition for a writ of certiorari was filed on August 3, 1978. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether petitioner, an attorney convicted of embezzling or unlawfully converting funds of a labor union, was

"employed" by the union within the meaning of 29 U.S.C. 501(c).

STATUTE INVOLVED

29 U.S.C. 501(c) provides:

> Any person who embezzles, steals, or unlawfully and willfully abstracts or converts to his own use, or the use of another, any of the moneys, funds, securities, property, or other assets of a labor organization of which he is an officer, or by which he is employed, directly or indirectly, shall be fined not more than $10,000 or imprisoned for not more than five years, or both.

STATEMENT

Following a non-jury trial in the United States District Court for the Southern District of New York, petitioner was convicted on 17 counts of embezzlement and unlawful conversion of union funds, in violation of 29 U.S.C. 501(c).[1] He was sentenced to concurrent terms of imprisonment for a year and a day on each count. The court of appeals affirmed, one judge dissenting (Pet. App. 1a-21a).

The relevant facts are set out in the opinions of the district court and the court of appeals (Pet. App. 2a-5a, 26a-50a),[2] Briefly, the evidence at trial established that in early 1971 petitioner, an attorney, agreed to represent Ricky Carnivale without charge in Carnivale's campaign for election to the presidency of Local 1101 of the Communication Workers of

[1]Petitioner was acquitted by the district court on seven additional counts of violating Section 501(c).

[2]Pursuant to Fed. R. Crim. P. 23(c), the trial judge made special findings of fact.

America. Petitioner's free legal representation was conditioned on his appointment as chief counsel to the union if Carnivale was successful (Tr. 754-756). Carnivale was elected; petitioner was then retained as chief counsel from April 1971 to December 1972, at $25,000 per year (G. Ex. 12, 13, 13A; Tr. 757-761, 921).

In June 1971, just prior to the commencement of a seven-month strike against the New York Telephone Company, the members of Local 1101 voted to pay the legal fees of union members arrested in connection with strike activities (Tr. 639-642, 769-770, 972-973). During the course of the strike, which ended in February 1972, approximately 45 members of the union were arrested for strike-related crimes. Although a few of the members were charged with felonies, the vast majority were charged with minor misdemeanor offenses such as disorderly conduct or harassment. As each arrest occurred, the Local's officers either referred the member to petitioner for representation or advised petitioner of the incident (Pet. App. 3a). Petitioner then submitted bills to the union for his alleged representation (G. Ex. 1-7); he did not submit a copy of the bill to, much less seek payment from, any of the individual members (Tr. 462, 926-930).

Each of the counts on which petitioner was convicted related to his submission of and receipt of payment for these bills, which purported to provide a description of the services rendered to union members but which in fact consistently misrepresented and overstated the nature and substance of petitioner's legal services. In some cases, petitioner submitted bills for services for members whom he never saw or consulted (Tr. 475-480, 484, 552-562, 1115-1131; Pet App. 33a-35a). On several occasions petitioner's only service was to speak to the member on the telephone and to advise him to file a complaint with the police

department (G. Ex. 4, 5; Tr. 196-203, 475-484, 580-586, 1115-1122, 1141-1148). On other occasions petitioner made brief court appearances for members whose cases were adjourned in contemplation of dismissal, but he billed for multiple appearances including trial representation (G. Ex. 6, 10B; Tr. 302, 324, 449-465). Petitioner did not prepare or file a single brief or memorandum of law in connection with any of the members he claimed to represent, yet he billed for that service as well (G. Ex. 4). On various bills, petitioner falsely claimed to have made appearances at police stations and at hearings and to have held witness interviews (see, *e.g.*, G. Ex. 2, 3, 8; Tr. 340, 362, 398, 412-415, 552-558). Finally, in some cases petitioner submitted bills for the representation of members who were actually represented by other counsel (G. Ex. 2, 3, 5, 7; Tr. 335-340, 398, 412-415, 605, 669-674).

Petitioner's bills were paid by the union.[3] Between October 21, 1971, and February 29, 1972, in addition to his regular fee from the union under his retainer agreement, petitioner received 45 checks totalling $113,025 from the Local's Defense Fund (G. Ex. 10A, 10B, 10C, 10D).

ARGUMENT

Petitioner contends that his conduct was not prohibited by 29 U.S.C. 501(c), which applies to "[a]ny person who embezzles * * * or unlawfully * * * converts to his own use * * * any of the moneys * * * of a labor organization of which he is an officer, or by which he is employed, directly or indirectly," because he was not an "employee" of the union and that the contrary holding of the court of appeals violates

[3]Contrary to the union's normal practice, many of these checks were written out, and all were signed, by Carnivale himself (Tr. 625-632, 638-639, 850-854, 934-935; G. Ex. 10B).

his due process rights and departs from the intent of Congress. The decision below, however, correctly construes Section 501(c) in light of its obvious purposes and does not conflict with the decision of any other circuit. There is no need for further review.

The facts established at trial clearly demonstrated that petitioner was "employed" by the union within the meaning of the statute. Pursuant to a written agreement, petitioner was hired to serve as chief counsel to Local 1101, handling all of its legal affairs, for $25,000 per year (Pet. App. 6a-7a; G. Ex. 12, 13). During the period that petitioner provided representation to members with legal difficulties stemming from the strike, the union officers either referred the member involved to petitioner or advised him of the incident directly (Pet. App. 7a). None of the fees in these cases was paid by the union members, nor did petitioner seek payment from the individual members. In the legal papers petitioner submitted in connection with the members' cases, he stated that he had been retained by the union, not the members, and he described himself as chief counsel to the Local (see, *e.g.*, G. Ex. 1406, 1908). Moreover, even prior to the strike petitioner attended and spoke at union gatherings, and he was at the Local's office daily working on union business (Pet. App. 7a; Tr. 782). In sum, as the court of appeals concluded, petitioner "by express agreement and in fact was employed by the Union" (Pet. App. 7a) and thus was subject to the proscriptions of Section 501(c).

Nonetheless, petitioner argues that he was employed as an "independent contractor" and that Section 501(c) should be construed to extend only to those satisfying the common

law definition of an "employee."[4] But while petitioner, who maintained his own offices outside the union, may not have been an "employee" of the union in the common law sense of a servant as distinguished from an "independent contractor," that distinction is irrelevant to the question posed here. The language of the statute does not speak of "employees" or "servants," and its coverage is not so limited. To the contrary, Section 501(c) expressly imposes criminal liability on "[a]ny person" who loots the funds of a union "by which he is employed."

The terminology chosen by Congress is not without significance, since it has defined the word "employee" in other contexts to exclude independent contractors. See, *e.g.*, 29 U.S.C. 152(3).[5] This difference in coverage frequently makes sense. In some areas, such as in determining the group with which an employer must bargain on issues such as wages, hours and conditions of

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[4]This is no merit to petitioner's claim that Section 501(c) would be unconstitutionally vague if it were construed to include all those employed by a union. "It is well established that vagueness challenges to statutes which do not involve First Amendment freedoms must be examined in the light of the facts of the case at hand." *United States* v. *Powell*, 423 U.S. 87, 92 (1975), quoting *United States* v. *Mazurie*, 419 U.S. 544, 550 (1975). Whatever the situation might be in cases where the employment relationship between a union and an independent contractor is sporadic or tangential, here the overwhelming evidence established that, regardless of how petitioner and Carnivale chose to structure the terms and conditions of petitioner's union duties, his employment relationship with the union was virtually indistinguishable from that of a regular, full-time employee.

[5]The definition of the term "employee" in the Labor-Management Reporting and Disclosure Act of 1959, Pub. L. No. 86-257, 73 Stat. 519, of which Section 501(c) is a part, does not specifically include or exclude independent contractors from its coverage. 29 U.S.C. 402(f).

employment (29 U.S.C. 158(d)), for example, it is reasonable to exclude independent contractors, who depend upon a fee rather than wages and who themselves decide how the work will be done (see Pet. App. 11a n.6). On the other hand, the purpose of this particular statutory provision—to protect union funds (see 29 U.S.C. 401)—is not at all served by excluding from its coverage a trusted legal advisor who is able to gain access to those funds. The court of appeals put the matter well (Pet. App. 8a-9a):

> The issue here is not the vicarious tort liability foisted upon a master by virtue of the unauthorized activity of his servant. Such liability is based on familiar *respondeat superior* concepts which lead to exculpation where the person employed performs the work without being subject to the control of his employer. The lawyer, like the physician, is a professional and if he is guilty of malpractice it may well be that under common law doctrine his employer will not be responsible in damages to one injured as the result of the lawyer's tortious activity. * * * Here we are construing a statute enacted by Congress to protect union funds against pilferage by any person it employed. [Petitioner] was given such employment by the Union as its Chief Counsel. This employment provided him with the opportunity, which he clearly seized, to take illicit advantage of Union funds. Whether he was an independent contractor, agent, or servant, was not the concern of Congress. This is clear from the language which Congress chose in §501(c).

In short, the court of appeals properly declined to restrict the scope of Section 501(c) to those persons meeting the common law definition of "servant" or "employee" when Congress did not use those terms and the restriction would

subvert the legislative intent. See *United States* v. *Culbert*, No. 77-142 (March 28, 1978).[6] Petitioner's "brazen scheme of looting the Union coffers" (Pet. App. 5a) was precisely the type of conduct the statute was designed to prevent.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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[6]Contrary to petitioner's contention (Pet. 9-11), the decision of the court of appeals is not in conflict with prior decisions in the Second and Sixth Circuits as to whether the words "directly or indirectly" in Section 501(c) modify the terms "embezzle, steal, abstract or convert" rather than the verb "employed." Since the court below found that petitioner was "directly" employed by the union, it was not necessary for it to address the government's contention that a person "indirectly" employed by a labor organization would fall within the coverage of the statute, and it therefore expressly declined to address the issue (Pet. App. 7a n.3).

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